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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

GABRIEL NATALINI, Plaintiff and Respondent, v. IMPORT MOTORS, INC., Defendant and Appellant.	A133236 (San Mateo County Super. Ct. No. CIV500678)

Plaintiff and respondent Gabriel Natalini (respondent), a car buyer, filed this action alleging individual and class claims against defendant and appellant Import Motors, Inc. (appellant), a car dealer. Appellant filed a petition to compel arbitration pursuant to a provision in the car sales contract, but the trial court denied the petition because appellant had not proven the existence of an arbitration agreement, appellant had waived its right to pursue arbitration, and the arbitration provision was unconscionable. This court affirmed in an appeal filed January 7, 2013, on the basis that the arbitration provision was unconscionable; we did not address the trial court's other grounds for denying appellant's petition. (*Natalini v. Import Motors, Inc.* (2013) 213 Cal.App.4th 587 (*Natalini I*).)

The California Supreme Court granted review and, on September 30, 2015, the Court transferred the matter for reconsideration in light of *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899 (*Sanchez*). *Sanchez* held that terms substantively identical to those considered in our decision did not render an arbitration provision

unconscionable. Although *Sanchez* undermines the reasoning of our prior decision, we again affirm the trial court's denial of the petition for arbitration, now on the basis that appellant failed to prove the existence of an arbitration agreement.

BACKGROUND

In November 2010, respondent filed an unverified complaint (Complaint) alleging eight causes of action against appellant arising out of his purchase of a car. Respondent asserted individual claims for negligent misrepresentation, violation of the Consumer Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), and violation of the Rees-Levering Motor Vehicle Sales and Finance Act (Civ. Code, § 2981 et seq.; hereafter the Rees-Levering Act). Respondent alleged the car and tires were sold as new when in fact they were used. Respondent asserted class claims for violation of the CLRA, violation of the Rees-Levering Act, unfair business practices (Bus. & Prof. Code, § 17200 et seq.), false or misleading advertisements (Bus. & Prof. Code, § 17500 et seq.), and declaratory relief. Respondent alleged that appellant's practices relating to consumer car trade-ins were unlawful. Attached to the Complaint as exhibit 1 was a document alleged to be a copy of the sales contract for respondent's car purchase. Paragraph 20 of the contract was an arbitration clause.

Appellant filed an answer to the Complaint in December 2010. Appellant denied "each and every, and all the allegations in [the Complaint], and the whole thereof . . . ." In May 2011, appellant filed a petition to compel arbitration. Appellant filed a declaration of its counsel in support of the petition. Attached as exhibit A to the declaration was a document described as "a true and correct copy of the standard California Retail Automobile Sales Contract by which [respondent] purchased a 2009 BMW M3 from" appellant. Paragraph 20 of the attached contract was an arbitration clause.

Respondent opposed the petition and, among other things, argued appellant had failed "to provide admissible evidence of an agreement to arbitrate." Respondent explained that the declarant "is [appellant's] attorney, and her testimony regarding what contract or contracts were made or signed is entirely inadmissible hearsay [citation] and

lacking in first-hand knowledge or any other foundation [citation]." Appellant submitted a "supplemental declaration" from its "custodian of records," attaching a "true and correct copy" of its contract with respondent, including an arbitration provision.

In September 2011, the trial court denied the petition to compel arbitration. The court declined to consider appellant's supplemental declaration, "which attempts to introduce evidence after [respondent] filed his opposition." The court found, "[t]here is no admissible evidence establishing [respondent] agreed to arbitrate his claim." The court also concluded appellant waived any right to arbitration and the purported arbitration provision was unconscionable.

Appellant appealed the trial court's order denying its petition to compel arbitration. In *Natalini I, supra*, 213 Cal.App.4th 587, this court affirmed on the ground that the alleged arbitration provision was unconscionable. The California Supreme Court granted review and, on September 30, 2015, the Court transferred the matter for reconsideration in light of *Sanchez, supra*, 61 Cal.4th 899. No party filed a supplemental brief in this court. (See Cal. Rules of Court, Rule 8.200(b)(1).)

DISCUSSION

Appellant contends the trial court erred in concluding it failed to demonstrate the existence of an arbitration agreement. We disagree.

Section 1281.2 of the Code of Civil Procedure[1] provides, "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy *if it determines that an agreement to arbitrate the controversy exists*," unless an enumerated exception applies. (Emphasis added.) "A petition to compel arbitration ' "is in essence a suit in equity to compel specific performance of a contract." ' " (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 411 (*Rosenthal*).) *Rosenthal* explained, "[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a

[1] All undesignated statutory references are to the Code of Civil Procedure.

written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement—either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation [citations]—that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." (*Id.* at p. 413.) "In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination." (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.)

In arguing the trial court erred in concluding it had not met its burden of proving the existence of an arbitration agreement, appellant relies on the Fourth District's decision in *Condee v. Longwood Management. Corp.* (2001) 88 Cal.App.4th 215 (*Condee*). There, the court stated, "For purposes of a petition to compel arbitration, it is not necessary to follow the normal procedures of document authentication." (*Id.* at p. 218.) *Condee* reasoned that section 1281.2 does not require that the arbitration agreement be admitted into evidence or that the trial court determine the agreement's validity. (*Condee* at p. 219.) *Condee* also emphasized the language of then rule 371 of the California Rules of Court (now rule 3.1330), which requires the petitioner to attach a copy of the agreement to the petition or to set forth its "provisions" in the petition.[2] (*Condee*, at p. 219.) *Condee* concluded a petitioner is obligated only to "allege the existence of an agreement and support the allegation as provided in" the California Rules

[2] Rule 3.1330 of the California Rules of Court provides: "A petition to compel arbitration or to stay proceedings pursuant to Code of Civil Procedure sections 1281.2 and 1281.4 must state, in addition to other required allegations, the provisions of the written agreement and the paragraph that provides for arbitration. The provisions must be stated verbatim or a copy must be attached to the petition and incorporated by reference."

of Court; "[o]nce the petitioners had alleged that the agreement exists, the burden shifted to respondents to prove the falsity of the purported agreement." (*Condee*, at p. 219.)

In the present case, appellant asserts it satisfied its burden as described in *Condee* by attaching the arbitration provision to its counsel's declaration and by setting forth the language of the provision in the petition. It asserts, "[r]espondent then had the burden of proving the *falsity* of the agreement." Appellant's argument is a valid interpretation of *Condee*, but *Condee* fails to follow the California Supreme Court's directives in *Rosenthal* on that point, as explained by another Fourth District decision. In *Toal v. Tardif* (2009) 178 Cal.App.4th 1208, Division Three of the Fourth District Court of Appeal, the same court that decided *Condee*, emphasized that *Rosenthal* required that the petitioner *prove* the existence of the agreement to arbitrate by a preponderance of the evidence and "clearly stated that a court, before granting a petition to compel arbitration, *must* determine the factual issue of 'the existence or validity of the arbitration agreement.' " (*Toal*, at p. 1219, citing *Rosenthal*, *supra*, 14 Cal.4th at pp. 402, 413.) *Toal* acknowledged that *Condee* suggested the burden could be shifted to the party opposing arbitration without that evidentiary showing and stated, "[t]o the extent *Condee* conflicts with *Rosenthal*, our Supreme Court's decision is controlling." (*Toal*, at p. 1219, fn. 8, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see also *Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 845-846 [recognizing limitations on *Condee* holding].)

Appellant does not argue it presented admissible evidence of the existence of an arbitration agreement, and it does not explain how its showing was sufficient to satisfy the requirements of *Rosenthal*, *supra*, 14 Cal.4th 394. Neither does appellant contend the trial court abused its discretion in declining to consider appellant's supplemental declaration from its custodian of records. And, although respondent attached a contract with an arbitration provision to the Complaint, appellant denied the allegations of the Complaint in its answer and appellant does not argue respondent is estopped from disputing the existence of an arbitration agreement. Appellant has not shown the trial

court erred in denying appellant's petition on the basis that appellant failed to prove the existence of an agreement to arbitrate.

DISPOSITION

This court's opinion filed January 7, 2013 is hereby vacated. The trial court's order is affirmed for the reasons stated herein. Costs on appeal are awarded to respondent.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.